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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/628,383	07/29/2003	Hector A. Solorio	58880/315	4327

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EXAMINER	
BHAT, NINA NMN	

ART UNIT	PAPER NUMBER
1764	

DATE MAILED: 01/10/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/628,383	SOLORIO ET AL.	
	Examiner	Art Unit	
	N. Bhat	1764	

-- The MAILING DATE of this communication appears on the cover she t with th correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *15 November 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-32* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-32* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *29 July 2003* is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. Applicant's arguments and amendments have been fully and carefully considered. Applicant's arguments are persuasive with respect to the anticipation rejections accordingly, the anticipation rejections are withdrawn. However, applicant has amended the claims and the amendments to the claims require a new ground of rejection necessitated by amendment. A new ground of rejection follows:

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claims 1-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 96/37120 (Herbert et al.)

Herbert et al. teach the invention substantially as claimed. Hebert et al. teach providing a liquid frozen cocktail concentrate, which is "slushy" quiescently frozen which has a Brix value in the range of 10° to 25°. In making the cocktail the concentrate is

diluted with water and with distilled 80 proof spirit in a volume ratio of 2:1 to 4:1. The 80 proof distilled spirits is ethanol. [Note Page 8, line 1-37] Herbert et al. teaches that the concentrate in its simplest form is a solution of water, a flavor ingredient or ingredients and a sweetener or sweetener. The flavor ingredient is typically a fruit flavor, which can include fruit juice or blend of fruit juices or combination of fruit juice and crushed natural fruit or fruit pieces. [Note Page 9, lines 30-37]. Herbert et al. further teach providing a frozen cocktail, which includes ethanol. The sweetener includes monosaccharides as well as disaccharides and high potency sweeteners such as aspartame . Herbert et al. teach that the addition of ethanol as a diluent greatly aids in blending of the frozen concentrate to form the finished drink.[Note Page 12, lines 1-35]

Herbert et al. that the spirits, which can be used with the frozen concentrate, include rum and tequila. Non-alcoholic frozen drinks are described as well as providing a soft ice cream is described however the preferred form of the frozen concentrate is a slush.

Although Herbert et al. does not specifically teach the amounts of high potency sweetener , flavoring, sugar substitute and ethanol used, Herbert does teach how one would dilute the frozen concentrate to provide for an alcoholic or non-alcoholic drink as well as specifically teaches that the amount of sweetener to be added ultimately depends in part on the taste and texture of the final blended frozen cocktail. Also included in the compositions are solids which includes no only unflavored fiber but also include non-flavoring protein, fat, nutrients, glycerol, p-glycerol, slats, gums and preservatives.[Note Page 10, lines 5-10]. Herbert et al. specifically teaches that the Brix

values varies within 10-25o because it depends on the factors which includes the nature of the flavoring, the sweeter and other ingredients, and whether the frozen cocktails contains alcohol (ethanol) or it is non-alcoholic. Thus, it would have been obvious to one having ordinary skill in the art at the time the invention was made, from reading Herbert to provide a frozen concentrate which includes the sweetener, flavoring, sugar substitute, ethanol and Brix as claimed because Herbert et al. teaches the factors in how to prepare a frozen concentrate and frozen cocktail beverage having a Brix within the same range as applicant as well as the frozen concentrate including the same ingredients as applicant and further how one of ordinary skill in the art would manipulate the frozen concentrate so that the concentrate would be well blended, not watery or slushy or etc. With respect to applicant claim which recite the that the freezing machine is a commercial freezing machine or soft serve ice cream machine this would have been obvious from reading Herbert despite the fact that Herbert is using a home blender and home freezers for storing a frozen concentrate and providing a frozen cocktail prepared at home because there is nothing in Herbert et al. which would preclude that the frozen concentrate could not be used in a commercial facility or use commercial soft serve machines because the it is irrelevant to the composition and process of Herbert whether it is made in the home or commercially and there is nothing in the reference which would preclude commercial blenders or ice cream makers from being used in preparing the nonalcoholic or alcoholic beverage as claimed. It is maintained that Herbert et al. fairly teaches and suggests applicant's concentrate and renders applicant's invention as a whole obvious.

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Syfert et al. teach a teach concentrate having freeze thaw stability and enhanced cold water solubility. Wade '075, and 561 teach fruit juice mix for whipped and/or frozen applications. Vann teach soft frozen all natural fruit juice. Baker teaches a frozen fruit flavored dairy slush product.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glenn Caldarola can be reached on 571-272-1444. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

N. Bhat
Primary Examiner
Art Unit 1764